IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Case No. _____

ROSENELL SUSI, MAE DIANA,
Petitioners,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Supreme Court of Ohio in this action is reported as *State ex. rel. Susi v. Flowers*, 42 Ohio St. 2d 11 (1975). The only other opinion, *State ex rel. Susi, et al. v. Flowers*, Case #74AP-140 (Franklin County Ct. App., 1974), is presently unreported.

GROUNDS FOR JURISDICTION

Judgment was entered in this action upon July 2, 1975. No rehearing was sought. Jurisdiction is granted by 28 U.S.C.A. §1257(3).

QUESTIONS OF LAW PRESENTED

Does the Double Jeopardy Clause of the Fifth Amendment as applied to the states by the Fourteenth Amendment bar a second criminal prosecution arising out of the same facts and evidence presented at an earlier trial at which the same defendants were found guilty?

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

The following provisions are before the Court

1) The Fifth Amendment to the Constitution of the United States
2) §2915.01, Ohio Rev. Code (Page, 1953) at Title 29, page 127
3) §2915.111, Ohio Rev. Code (Page, 1953) at 1972 Supplement to Title 29, page 49.

STATEMENT OF THE CASE

On August 31, 1973, officers from Columbus, Ohio Police Department, arrested petitioners Rosenell Susi and Mae Diana and charged them with violations of Ohio Rev. Code §§2915.01 and 2915.111, (Page, 1953), which were "permitting a room to be used for gambling" and "possession of 'numbers game' ticket" respectively. The possession of numbers charge was later amended to possession of numbers, second offense. This latter charge is the foundation for the present petition.

On March 6, 1972, petitioners were tried and convicted upon the "keeping a room" charge and found guilty in the Municipal Court of Franklin County, Ohio.

On March 8, 1972, petitioners filed a motion to dismiss the charge of possession of numbers pending in the

Court of Common Pleas for Franklin County, Ohio, as violative of double jeopardy. This motion was overruled. Subsequently, writs of mandamus and prohibition on a double jeopardy theory were sought and denied. A review of the latter writ is sought here.

The State of Ohio has stipulated throughout that the precise same facts and evidence are involved in both prosecutions.

REASONS FOR GRANTING THE WRIT

In *Benton v. Maryland,* 395 U.S. 784 (1969) the Court declared the double jeopardy provisions of the Fifth Amendment applicable to the states. Certain guidelines for the application of those provisions were later set forth in *Waller v. Florida,* 397 U.S. 387 (1970) and *Ashe v. Swenson,* 397 U.S. 436 (1970). The present action offers this Court the opportunity to give further guidance as to the applicability of the Double Jeopardy Clause in a situation which involves multiple prosecutions in series based upon the "same facts . . . and . . . evidence," as the State of Ohio has stipulated.

Petitioners submit that *Waller v. Florida, supra,* should in fact, be determinative of this case, since the question of multiple sovereignties is there discussed. However, *Waller* has been restricted to its facts by the Ohio Courts.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Ohio.

Respectfully submitted,

TYACK, SCOTT & COLLEY

By Thomas M. Tyack

THOMAS M. TYACK
Attorneys for Petitioners
536 South High Street
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221-1341 (614)

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of September, 1975, three copies of the Petition for Writ of Certiorari were personally delivered to the office of George C. Smith, Prosecuting Attorney, Hall of Justice, 369 South High Street, Columbus, Ohio. I further certify that all parties required to be served have been served.

TYACK, SCOTT & COLLEY

By Thomas M. Tyack

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APPENDIX "A"

THE SUPREME COURT OF THE STATE OF OHIO
1975 TERM
To wit: July 2, 1975

No. 74-892

APPEAL FROM THE COURT OF APPEALS
for FRANKLIN County

THE STATE OF OHIO,
City of Columbus.
[STATE OF OHIO, EX REL.]
ROSENELL SUSI ET AL.,
Appellants,
vs.
JAY FLOWERS, JUDGE,
Appellee.

This cause, here on appeal from the Court of Appeals for Franklin County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed; for the reasons set forth in the opinion rendered herein, and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Court of Appeals to carry this judgment into execution; and that a copy of this entry be certified

to the Clerk of the Court of Appeals for FRANKLIN Couny for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court

this ____ day of _____, 19____

_____Clerk

_____Deputy

APPENDIX "B"

DECISION OF THE SUPREME COURT OF OHIO

On August 31, 1971, appellants, Rosenell Susi and Mae Diana, were arrested and charged with permitting a room to be used for gambling, a misdemeanor, in violation of R. C. 2915.01, and possession of numbers game tickets, a felony, in violation of R. C. 2915.111. On November 26, 1971, the felony charge was amended to possession of numbers game tickets, second offense.

On March 6, 1972, the appellants were tried and convicted on the misdemeanor charge in the Franklin County Municipal Court. Subsequently, they were indicted for the violation of R. C. 2915.111, which charge is presently pending in the Court of Common Pleas of Franklin County. (No. 72 CR-03-372.) On August 16, 1972, the Court of Common Pleas overruled appellants' motion to dismiss the felony charge. On November 27, 1973, appellants' complaint in the Court of Appeals for a writ of habeas corpus was dismissed. *In re Susi* (1973), 83 Ohio App. 2d 73.

Appellants, in the instant action, sought a writ of prohibition in the Court of Appeals, ordering the judge of the Court of Common Pleas to exercise no further jurisdiction as to the felony indictment pending before him. The Court of Appeals dismissed the complaint.

The cause is now before this court upon an appeal as of right.

Messrs. Tyack, Scott & Colley and *Mr. Thomas M. Tyack*, for appellants.

Mr. George C. Smith, prosecuting attorney, and *Mr. David F. Graeff*, for appellee.

Per Curiam. Appellants assert that their trial on the pending charge is barred by the double jeopardy clauses

of the Ohio and federal constitutions, citing *Ashe v. Swenson* (1970), 397 U.S. 436, and *Owens v. Campbell* (1971), 27 Ohio St. 2d 264.

In *Ashe,* the petitioner and three others were arrested for robbing, and stealing a car from, a group of six poker players. Each defendant was charged with seven separate offenses—the armed robbery of each of the six poker players, and the theft of the car.

The petitioner was brought to trial on a charge of robbing Donald Knight, one of the participants in the poker game, and acquitted. Subsequently, he was tried for robbing another participant in the poker game, a man named Roberts, and convicted.

Upon appeal from the denial of a writ of habeas corpus, the United States Supreme Court reversed the petitioner's conviction, holding that the doctrine of collateral estoppel is part of the Fifth Amendment's guarantee against double jeopardy. At page 446, the court stated:

"The question is not whether Missouri could validly charge the petitioner with six separate offenses for the robbery of the six poker players. It is not whether he could have received a total of six punishments if he had been convicted in a single trial of robbing the six victims. It is simply whether, after a jury had determined by its verdict that the petitioner was not one of the robbers, the state could constitutionally hale him before a new jury to litigate that issue again."

In a concurring opinion, Mr. Justice Brennan, joined by Justices Douglas and Marshall, expressed his view that "the double jeopardy clause requires the prosecution, except in most limited circumstances, to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode or transaction." *Ashe,* at page 453.

In *Owens,* the appellant therein was indicted for breaking and entering an inhabited dwelling in the night season, assault with a dangerous weapon, and rape. Although the uncontradicted testimony of the victims was that all three offenses had been committed in rapid succession by the same person, the state elected to try the appellant on the breaking and entering charge first. After appellant's acquittal, this court, relying upon *Ashe v. Swenson,* ordered the remaining indictments dismissed.

Neither *Ashe* nor *Owens* supports the position taken by the appellants herein, for two reasons.

First, the doctrine of collateral estoppel is not applicable to this case. Collateral estoppel provides that one who has been adjudged not guilty of a criminal charge may not be tried thereafter upon a separate charge arising out of the same event or occurrence. In the present case, the appellants were not acquitted in the initial trial, but convicted.

Second, neither the United States Supreme Court, nor this court, has determined the so-called same transaction test, enunciated by Justice Brennan in his concurring opinion in *Ashe,* to be an essential Fifth Amendment guarantee. See Justice Harlan's concurring opinion, at page 448 of *Ashe, supra; State v. Ferguson* (1964), 175 Ohio St. 390, 394. We adhere to the mandate of the United States Supreme Court in this regard.

To support the issuance of a writ of prohibition, appellants must show that the court or officer against whom the writ is sought is about to exercise judicial or quasi-judicial power; that the exercise of such power is unauthorized by law; and that refusal of the writ will result in injury for which there is no other adequate remedy in the ordinary course of the law. *State, ex rel. McKee v. Cooper* (1974), 40 Ohio St. 2d 65; *State, ex rel. Lehmann, v. Cmich* (1970), 23 Ohio St. 2d 11.

Upon the instant record, appellants are not entitled to the extraordinary writ of prohibition, and the judgment of the Court of Appeals, dismissing the complaint, is affirmed.

Judgment affimed.

O'NEILL, C. J., HERBERT, CORRIGAN, STERN, CELEBREZZE, W. BROWN and P. BROWN, JJ., concur.

APPENDIX "C"

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

No. 74AP-140

ROSENELL SUSI and MAE DIANA,
Relators,

v.

THE HONORABLE JAY FLOWERS,
Judge of the Court of Common Pleas,
Franklin County, Ohio,
Respondent.

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the decision of this court rendered herein on July 30, 1974, it is the judgment and order of this court that respondent's motion to dismiss is sustained and the complaint is dismissed.

ROBERT S. HOLMES
ALBA L. WHITESIDE
ARCHER E. REILLY
Judges

APPENDIX "D"

IN THE COURT OF APPEALS
OF FRANKLIN COUNTY, OHIO

No. 74AP-140

ROSENELL SUSI and MAE DIANA,
Relators,

v.

THE HONORABLE JAY FLOWERS,
Judge of the Court of Common Pleas,
Franklin County, Ohio,
Respondent.

DECISION

Rendered on July 30, 1974

TYACK, SCOTT & COLLEY
MR. THOMAS M. TYACK
536 South High Street
Columbus, Ohio
For Relators

MR. GEORGE C. SMITH
Prosecuting Attorney

MR. WILLIAM B. SHIMP and
MR. DAVID J. GRAEFF
Assistants

Franklin County Hall of Justice,
Columbus, Ohio
For Respondent

Per curiam.

No. 74AP-140

This matter comes before this court by way of the respondent's motion to dismiss upon the basis that the relators' complaint in this original action in prohibition does not state a claim upon which relief can be granted, and upon the merits.

The issue presented in this case was previously decided by this court in the unreported decision rendered in *In the Matter of the Complaint for a Writ of Habeas Corpus for Rosenell Susi and Mae Diana,* No. 73AP-384, Court of Appeals for Franklin County, November 27, 1973 (1973 Decisions, page 3039). The issue presented was discussed at pages 3041 and 3042 of said decision, and we found that collateral estoppel could not apply.

The complaint fails to state a cause of action in prohibition. *State, ex rel. Vance, v. Glasser* (1974), 38 Ohio St. 2d 49. The complaint does not set forth a claim that relators are being charged a second time for the identical offense but, rather, another offense arising out of the same transaction. Thus, double jeopardy is not involved. Collateral estoppel does not apply because there is no allegation that relators were found not guilty upon the original trial. The memorandum attached to the complaint clearly indicates that the issues here are the identical issues raised in case No. 73AP-384, which relators now attempt to litigate in prohibition rather than habeas corpus.

Accordingly, the motion to dismiss must be sustained, and, even though the matter be considered on the merits, the writ must be denied.

HOLMES, WHITESIDE and REILLY, JJ., concur.

APPENDIX "E"

FIFTH AMENDMENT, CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 2915.01, Ohio Revised Code (Page, 1953) at Title 29, p. 127.

No person shall keep a room, building, arbor, booth, shed, tenement, canalboat, or other watercraft, to be used or occupied for gambling, or knowingly permit it to be used or occupied, or being the owner thereof rent it to be so used or occupied. An owner of such building, tenement, or watercraft knowing that a device is used or kept therein for gambling, who does not forthwith make complaint against the person so using or keeping it has knowingly permitted it to be used and occupied for such purpose.

Section 2915.111, Ohio Revised Code (Page, 1953) at 1972 Supp. to Title 29, p. 49.

No person shall own, possess, have on or about his person, have in his custody, or have under his control a

ticket, order, or device for or representing a number of shares or an interest in a scheme of chance known as "policy", "numbers game", "clearing house", or by words or terms of similar import, located in or to be drawn, paid or carried on within or without this state.